BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF PIRATES PLUNDER, INC. d.b.a. SOURDOUGH RESTAURANT, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 839 and 897 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These matters, the consolidated appeals of two $100 civil penalties for alleged smoke emission violations of respondent's Regulation I, came before the Pollution Control Hearings Board (Chris Smith, presiding officer, and Walt Woodward) at a formal hearing in the Seattle facility of the State Board of Industrial Insurance Appeals on September 4, 1975.

Appellant was represented by its president, Hal E. Griffith, Jr. Respondent appeared through Keith D. McGoffin. Eugene Barker, Olympia court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted.

Appellant made a closing argument.

From testimony heard, exhibits examined and argument considered, and exceptions from respondent, said exceptions being granted in part and denied in part, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I.

Respondent, pursuant to Section 5, chapter 69, Laws of 1974, 3d Ex. Sess. (RCW 43.21B.260), has filed with this Board a certified copy of its Regulation I containing respondent's regulations and amendments thereto.

II.

Section 1.01 of respondent's Regulation I states, among other items, that it is the public policy of respondent to protect human health and safety; to prevent, to the greatest degree practicable, injury to plants, animals and property; to foster the comfort and convenience of inhabitants; to promote the economic and social development of the area, and to facilitate enjoyment of the natural resources of the area. Section 9.03 makes it unlawful to cause or allow the emission for more than three minutes in any one hour of an air contaminant of greater opacity than 40 percent prior to July 1, 1975 and 20 percent thereafter. Section 3.29 authorizes respondent to levy a civil penalty of not more than $250 for any violation of Regulation I.

III.

Appellant, since 1969, has operated a restaurant at Pier 57 on the waterfront of Seattle, King County. The restaurant features seafood cooked over alderwood in the tradition of Puget Sound Indians. The

restaurant has grown in popularity and now is a tourist attraction. Emissions from the seafood grill and a hamburger grill are vented to the atmosphere through separate stacks which emerge from the restaurant roof about 35 feet above the level of Alaskan Way, the street which parallels the Elliott Bay waterfront.

IV.

In November, 1974, respondent, which originally adopted Regulation I in 1968, entered a new phase of enforcement of its visual emission standards (Section 9.03) by applying them to restaurants. Appellant was among the first to be contacted. For the next four months, respondent was not successful in efforts to obtain a smoke emission compliance schedule from appellant.

V.

On March 20, 1975, an inspector on respondent's staff observed blue-white smoke of 60 percent opacity being emitted for at least six consecutive minutes from appellant's hamburger grill stack. In connection therewith, respondent served on appellant Notice of Violation No. 10651, citing Section 9.03 of respondent's Regulation I, and Notice of Civil Penalty No. 1990 in the sum of $100.

On July 21, 1975, an inspector on respondent's staff observed blue smoke varying in opacity from 25 to 80 percent being emitted from appellant's seafood grill stack for eight minutes during a 40-minute continuous observation period. In connection therewith, respondent served on appellant Notice of Violation No. 11051, citing Section 9.03 of respondent's Regulation I, and Notice of Civil Penalty No. 2314 in the sum of $100.

The civil penalties are the subjects of the appeals.

VI.

In both instances, the smoke was dispersed quickly in the atmosphere 35 feet above street level and was not noticeable at street level.

VII.

Any Conclusion of Law hereinafter stated which is deemed to be a Finding of Fact is adopted herewith as same.

From these facts, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I.

Appellant was in violation of respondent's Regulation I as cited in Notices of Violation Nos. 10651 and 11051.

II.

The amounts levied in Notices of Civil Penalty Nos. 1990 and 2314, although only two-fifths of the maximum allowable amount in each instance, are far from reasonable. What we have here is a popular Seattle waterfront restaurant which is, to use some key words from Section 1.01 of respondent's Regulation I, important to the area's "economic and social development" by providing food cooked in the tradition of the area's natives for the "comfort and convenience" of its patrons while affording them "enjoyment" of the waterfront, one of the area's "natural resources."

To the contrary, and again using key words from Section 1.01, it is difficult for this Board to conceive how the emissions observed in this case which are quickly dispersed into the atmosphere 35 feet above street level, could endanger "human health and safety" or be injurious to "plants, animal life or property."

Trained and experienced inspectors on respondent's staff saw emissions of greater opacity than is permitted by Section 9.03 of Regulation I. Counsel for respondent is correct when he noted, in questioning a witness for appellant, that there is no "severity" clause in Section 9.03. There either is a visual emission violation or there is not; there were violations in both instances here.

But Section 3.29 of Regulation I, by implication, does provide a "severity" ratio. The maximum allowable amount is $250; by inference, the minimum is $1. Respondent, in levying civil penalties, generally uses this implied "severity" ratio. In these matters, respondent has made a judgment that the violations, on a scale of $1 to $250, call for penalties of $100 each.

We strongly disagree. Those penalties, in view of the circumstances which we have recited in a preceding paragraph of this Conclusion, not only are unreasonable, but excessive and unwarranted. On a "severity" scale of $1 to $250, each instant violation does not warrant a penalty of more than $1.

III.

Any Finding of Fact herein which is deemed to be a Conclusion of Law is adopted herewith as same.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The appeals are denied, but Notice of Civil Penalty No. 1990 is reduced from $100 to $1 and Notice of Civil Penalty No. 2314 is reduced from $100 to $1.

DONE at Lacey, Washington, this 5th day of December, 1975.

POLLUTION CONTROL HEARINGS BOARD

Chris Smith

CHRIS SMITH, Chairman

Walt Woodward

WALT WOODWARD, Member

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I.

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III.

Appellant, since 1969, has operated a restaurant at Pier 57 on the waterfront of Seattle, King County. The restaurant features seafood cooked over alderwood in the tradition of Puget Sound Indians. The restaurant has grown in popularity and now is a tourist attraction.

Emissions from the seafood grill and a hamburger grill are vented to the atmosphere through separate stacks which emerge from the restaurant roof about 35 feet above the level of Alaskan Way, the street which parallels the Elliott Bay waterfront.

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V.

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The civil penalties are the subjects of the appeals.

VI.

In both instances, the smoke was minimal in quantity, was dispersed quickly in the atmosphere 35 feet above street level and was not noticeable at street level. In both instances, the smoke was emitted from devices which promoted the economic and social development of the area by fostering the comfort and convenience of inhabitants and by facilitating the enjoyment of the area's natural resources.

VII.

Any Conclusion of Law hereinafter stated which is deemed to be a Finding of Fact is adopted herewith as same.

From these facts, the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I.

Appellant was in violation of respondent's Regulation I as cited in Notices of Violation Nos. 10651 and 11051.

II.

The amounts levied in Notices of Civil Penalty Nos. 1990 and 2314, although only two-fifths of the maximum allowable amount in each instance, are far from reasonable. What we have here is a popular Seattle waterfront restaurant which is, to use some key words from Section 1.01 of respondent's Regulation I, important to the area's "economic and social development" by providing food cooked in the tradition of the area's natives for the "comfort and convenience" of its patrons while affording them "enjoyment" of the waterfront, one of the area's "natural resources."

To the contrary, and again using key words from Section 1.01, it is difficult for this Board to conceive how the minimal emissions, quickly

dispersed into the atmosphere 35 feet above street level, could endanger "human health and safety" or be injurious to "plants, animal life or property."

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We strongly disagree. Those penalties, in view of the circumstances which we have recited in a preceding paragraph of this Conclusion, not only are unreasonable, but excessive and unwarranted. On a "severity" scale of $1 to $250, each instant violation does not warrant a penalty of more than $1.

III.

Any Finding of Fact herein which is deemed to be a Conclusion of Law is adopted herewith as same.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The appeals are denied, but Notice of Civil Penalty No. 1990 is

reduced from $100 to $1 and Notice of Civil Penalty No. 2314 is reduced from $100 to $1.

DONE at Lacey, Washington, this 7th day of ~~September~~ October, 1975.

POLLUTION CONTROL HEARINGS BOARD

CHRIS SMITH, Chairman

WALT WOODWARD, Member